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No. 85-435

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

THE CITY OF GAINESVILLE, FLORIDA,
Petitioner,

v.

ISLAND CREEK COAL SALES COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Question Presented for Review

Did the court of appeals properly affirm the judgment of the district court which enforced a judicially confirmed arbitration award that directed petitioner to continue the performance of its contract by ordering petitioner to enter into a commercially reasonable agreement for the acceptance of coal which it had refused to accept during the pendency of the confirmation proceedings?

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Statement of Jurisdiction

On June 10, 1985, the United States Court of Appeals for the Sixth Circuit affirmed a judgment of the United States District Court for the Western District of Kentucky enforcing a previously confirmed interim award rendered in favor of respondent Island Creek Coal Sales Company ("Island Creek") by a panel of the American Arbitration Association. *Island Creek Coal Sales Co.* v. *City of Gainesville*, 764 F.2d 437 (6th Cir. 1985) (Appendix at 1a-10a).* A petition for rehearing filed by petitioner the City of Gainesville ("Gainesville") was denied by the court of appeals on

* Pages 1a through 26a are contained in the Appendix to the petition; pages 27a through 34a are contained in the Appendix hereto.

July 12, 1985 (Appendix at 11a). On August 8, 1985, Gainesville's motion for a stay of the mandate pending application for certiorari was also denied.

Gainesville invokes the Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statement of the Case

In 1978 Gainesville entered into a long-term contract to buy coal from Island Creek, to last at least ten years and with an option for an extension of a further twenty-five years. The contract specified a base price for the coal and also provided for increases in that price to reflect increases in certain production costs. Deliveries began in January 1981. But, as the court of appeals observed, "[t]he price of coal subsequently declined, and in January 1983 Gainesville sought to terminate the sales agreement" (Appendix at 2a).

Toward that end, Gainesville invoked the arbitration provision in the coal sales contract, claiming that Island Creek had violated the contract. On May 10 and 11, 1983, hearings on the claim were held in Louisville, Kentucky before a three-member panel appointed by the American Arbitration Association.* Less than a week later, on May 16, 1983, long before any decision was reached by the panel, Gainesville unilaterally terminated the contract on the basis

* Contrary to Gainesville's contention that "[t]he arbitrators had permitted no pre-arbitration discovery" (Pet. at 2), there was extensive document production by Island Creek prior to the hearing—production as to which Gainesville's counsel assured the panel he was satisfied (May 11, 1983 Arbitration Transcript at 112).

of the claimed violation which was the very subject of the arbitration it had commenced.*

Island Creek thereupon requested an emergency hearing at which, on May 23, 1983, it sought and obtained an interim order from the arbitrators requiring Gainesville, pending the outcome of the arbitration, to maintain the status quo with respect to the coal sales contract as it existed on May 11, 1983.** Specifically, the interim award directed Gaines-

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* The arbitrators ultimately entered a unanimous final award finding that there had been no violation of the coal sales contract and thus rejecting Gainesville's attempt to escape its contractual obligations. The final award, issued on September 22, 1983, was confirmed by the United States District Court for the Western District of Kentucky on October 18, 1984 and the time for appeal has elapsed.

** At page 3 of its petition Gainesville repeats verbatim a serious misstatement of the record previously made to the court of appeals. It states, incorrectly, that "[t]he arbitrators asked for input into the wording of the award, but Island Creek offered no suggestions," implying that Island Creek's effort to enforce maintenance of the status quo was a litigation afterthought which sought to read into the award something that was not there. In fact, Island Creek essentially provided the language of the interim award:

> Mr. Brenton [chairman of the panel]: [A]t this point we need to draft an appropriate order. Mr. Calk would you care to start out on the drafting of the order while we're on the phone here and we'll get the wording down the way the parties wish the wording to be . . . .
>
> Mr. Calk [counsel for Island Creek]: Well, as I visualize it, Mr. Brenton, the Order should simply read, pursuant to the motion on the part of Respondent, Island Creek Coal Sales, it is ordered by this Panel or Board . . . that the City of Gainesville be and it is hereby directed to continue the performance of the contract between the parties made the subject of this proceeding until further orders of the Board.

(May 23, 1983 Arbitration Transcript at 53-54).

It was *Gainesville* which stood mute:

> Mr. Brenton: Mr. Pitt, do you have any input you want to . . .
>
> Mr. Pitt [counsel for Gainesville]: I'm not going to be real helpful on that.
>
> Mr. Brenton: I want you to have the opportunity for input into the drafting of this thing in any event.
>
> Mr. Pitt: Well, I don't see that I have any real desire to have any input into the drafting of it.

(*Id.* at 56).

ville to "continue the performance of the contract made the subject of this arbitration by accepting shipments of coal made from Holden #22 Mine, until further order of this panel" (Appendix at 12a).

Gainesville did not obey the arbitrators' interim award. Consequently, Island Creek was obliged to seek confirmation in the United States District Court for the Western District of Kentucky. Gainesville sought vacatur of the interim award.* On July 22, 1983, the district court confirmed the interim award and denied the motion to vacate (Appendix at 13a). Gainesville appealed from that judgment, and it was affirmed by the Court of Appeals for the Sixth Circuit in an opinion dated March 15, 1984. *Island Creek Coal Sales Co.* v. *City of Gainesville,* 729 F.2d 1046 (6th Cir. 1984) (Appendix at 27a).

After the interim award was confirmed, Gainesville, pursuant to that award, began to accept coal deliveries on the schedule which had been in effect on May 11, 1983 (Ap-

* Gainesville also took other steps to avoid the effect of the interim award. The same day that the confirmation motion was made in the Western District of Kentucky, where the arbitration had been held, Gainesville commenced a RICO and fraud action against Island Creek in the federal court in Gainesville, Florida, which, *inter alia,* sought to enjoin the confirmation proceeding. The District Court for the Western District of Kentucky enjoined Gainesville from pursuing the injunctive aspect of its Florida action, on the ground that under the Federal Arbitration Act it had exclusive jurisdiction over the award. That injunction was also affirmed by the Court of Appeals for the Sixth Circuit in the opinion affirming the confirmation of the interim award (Appendix at 27a).

As for the remainder of the Florida action, the United States District Court for the Northern District of Florida granted summary judgment dismissing Gainesville's complaint on November 19, 1984, and Gainesville appealed. On September 24, 1985, the dismissal was unanimously affirmed by the Court of Appeals for the Eleventh Circuit.

pendix at 21a). However, in the interval between entry of the interim award and its confirmation, Gainesville had refused to accept the coal tendered in accordance with the contractual status quo, some 90,000 tons in all. Island Creek's efforts after confirmation to negotiate a timetable for delivery of this coal which the arbitrators had ordered Gainesville to take were unsuccessful. Accordingly, on September 9, 1983, Island Creek moved the district court to hold Gainesville in contempt for this violation of the confirmed interim award.

On October 21, 1983, the district court sustained Island Creek's contention that Gainesville had defaulted on its obligations under the interim award, although it declined to impose sanctions for contempt at that time. In response to Gainesville's defense of the contempt motion, in which it had argued that the July 22, 1983 judgment of confirmation was ambiguous, the court "clarified" that the judgment did indeed require Gainesville to accept the 90,000 tons of coal it had refused to take under the contract, and urged the parties to devise a mutually agreeable timetable for delivery of the shipments (Appendix at 17a). The court did not itself set up any schedule for such deliveries.

Gainesville did not comply with the October 21 order, but instead moved to vacate it on the ground it added duties to those spelled out in the confirmed interim award. In the memorandum opinion accompanying its December 1, 1983 judgment, the district court rejected this contention, stating that the duty to accept coal between May 23, 1983 and July 22, 1983 always had been a part of the interim award (Appendix at 20a-22a). The refusal to impose contempt sanctions was a matter of the court's discretion, not a determi-

nation that the interim award had not required acceptance of the coal, and the court pointedly warned that future "[f]ailure to accept the missing shipments of coal will be grounds for a finding of contempt" against Gainesville (Appendix at 22a).

Nevertheless, Gainesville persisted in its refusal to obey this aspect of the interim award and made yet another attack upon it by a motion to alter or amend the December 1, 1983 judgment. On January 24, 1984, after a hearing on the motion, the district court stayed its December 1 judgment pending appeal, but conditioned this relief on the posting of a bond by Gainesville. The bond was to be forfeited if Gainesville failed to comply with the December 1 judgment within thirty days of the district court's receipt of the appellate court's mandate.

Gainesville appealed from the December 1, 1983 judgment. Island Creek cross-appealed insofar as the January 24, 1984 modification failed to specify that Gainesville's bond would be forfeited unless it both accepted and paid for coal pursuant to its contractual obligations. The cross-appeal was necessitated by the fact that Gainesville had not paid for 60,000 tons of coal allegedly "accepted" pursuant to the interim order after that order was confirmed.

On June 10, 1985, the Court of Appeals for the Sixth Circuit affirmed the December 1, 1983 judgment, as modified on January 24, 1984, except as to the provision for a bond, finding that the district court had power to enforce its confirmation of the interim award in the face of Gainesville's non-compliance. The appellate court set aside the bond requirement, subject to Gainesville's payment for the

60,000 tons within thirty days of that court's order. The court of appeals held that "[t]he [district] court only required Gainesville to do specifically that which was inherently required of it by the arbitrators under the contract" (Appendix at 7a). It did not hold, as Gainesville contends (*e.g.*, Pet. at 5), that the district court *had* modified or corrected the interim award, but merely suggested in dictum that "*if* the [district] court's action could be characterized as a modification or correction" (Appendix at 9a) (emphasis supplied), it was consistent with the policy expressed in Section 11(c) of the Federal Arbitration Act, 9 U.S.C. § 11(c): "In light of Gainesville's position throughout the course of this dispute, we find the district court's orders were necessary 'to effect the intent [of the arbitrators' decision] and promote justice between the parties.'" (*Id.*, quoting 9 U.S.C. § 11(c)) (insertion by the court). One judge dissented.

Gainesville applied for rehearing. This request was denied by a unanimous three-judge panel on July 12, 1985. Gainesville then unsuccessfully sought a stay pending disposition of its petition for certiorari. All told, the interim arbitration award has been the subject of four applications by Gainesville in two separate district courts; has been upheld by the district court in confirmation proceedings and contempt proceedings; and has been twice affirmed and thrice reviewed by the Court of Appeals for the Sixth Circuit. Now, in the guise of certiorari, Gainesville seeks a fourth appellate review.

Reasons for Denying the Writ

Gainesville's petition simply does not warrant the attention of the United States Supreme Court. It presents no conflict between the decision below and any controlling decision of this Court or decisions of other courts of appeal. To the contrary, a grant of certiorari here would signal other litigants that the very policy of arbitration finality which Gainesville advances as a reason supporting review may be defeated by a simple course of relentless resistance to the arbitral award. Such a message would be at war with this Court's recent decisions encouraging resolution of disputes by arbitration. *See, e.g., Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, —— U.S. ——, 105 S.Ct. 3346 (1985); *Dean Witter Reynolds, Inc.* v. *Byrd*, —— U.S. ——, 105 S.Ct. 1238 (1985); *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983).

Moreover, as the foregoing statement of the case suggests, the petition presents a unique factual situation, unlikely to recur in or have significance for other cases. No legal question of overriding importance is involved. Finally, all of the issues were fully considered and correctly determined by the court of appeals.

I. THE DISTRICT COURT PROPERLY ENFORCED ITS JULY 22, 1983 JUDGMENT

The factual linchpin of the instant petition is the assertion that the district court, in enforcing the arbitrators' May 23, 1983 interim award, which it had confirmed on July 22, 1983, modified the provisions of the award to require Gainesville to follow a specified schedule to "make up"

deliveries it had refused to take under the confirmed interim award. This contention is in error; in fact, the district court did nothing more than confirm and then enforce the letter of the interim award. At no time did it specify a delivery schedule.* (*See* Appendix at 17a, 23a). This without more warrants denial of the writ.

Contrary to Gainesville's present contention, there was no dispute in the district court as to the performance required by the interim award. The parties and the arbitrators all understood that as of May 11, 1983, the contractual status quo included periodic coal deliveries which were taking place at the approximate rate of 10,000 tons of coal every eight days (Appendix at 21a). Ten thousand tons was the capacity of Gainesville's "unit train" which picked up the coal from the source mine; eight days was its turnaround time. This practice was fully consistent with the delivery provisions of the coal sales contract.**

The chairman of the arbitration panel specifically stated that the application resolved by issuance of the interim award was for "an order directing the City of Gainesville to maintain the status quo, *to continue receiving coal* until such time as the Panel of Arbitrators has rendered their decision on whether or not Island Creek breached the contract" (emphasis supplied), and counsel for Gainesville acknowledged that this was a fair statement of the subject

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* Judge Merritt's dissent was apparently predicated on the mistaken belief that the district court had ordered Gainesville to take a coal shipment every eight days. (*See* Appendix at 9a).

** Article III, Section 1 called for delivery rates to be "as uniform as practicable throughout the year." Article III, Section 2 provided for shipment in unit trains of not less than 5,000 and not more than 10,000 tons at reasonably equal intervals year-round except during miners' scheduled vacation periods.

matter of the emergency hearing (May 23, 1983 Arbitration Transcript at 48-50). Moreover, Gainesville placed on the record of the arbitration proceeding its awareness of the prevailing delivery rate under the contract. Specifically, counsel for Gainesville proposed that Island Creek post a bond to compensate Gainesville for its costs in maintaining the status quo, and used the 10,000 ton/eight day delivery formula to calculate the amount of the proposed bond (May 23, 1983 Arbitration Transcript at 57, 60-61; *see* the district court's December 1, 1983 Memorandum Opinion in the Appendix at 21a).

Most tellingly, Gainesville's actions after confirmation of the interim award but *before any order was issued in the contempt proceeding* demonstrate unequivocally that it understood exactly what rate of coal deliveries it had been ordered to maintain. As Gainesville itself advised the district court in its September 27, 1983 Memorandum in Support of Defendant's Motion to Dismiss Contempt Petition, etc., at 3: "As soon as possible after [the district court's] July 22 judgment, *the City once again began accepting coal pursuant to the interim order*, and with the exception of one week when its train suffered a derailment, *has accepted coal approximately every eight days since August 2 in amounts of approximately 10,000 tons per shipment.*" (emphasis supplied).*

* In complaining that the district court relied on "a statement of counsel" (Pet. at 13) and " 'the parties briefs' " (*id.*) as to "the parties' conduct under the contract" (Pet. at 14), Gainesville ignores the fact that the statement was an *admission* by *its* counsel in *its* brief. It also misleads this Court in claiming that "there has never been an opportunity to present any evidence regarding this matter" (Pet. at 12); Island Creek submitted affidavits "regarding this matter" in support of its contempt motion, and Gainesville was certainly free to do the same in opposing that motion. It simply chose not to utilize the opportunity it had.

Gainesville concedes (Pet. at 13) the following principle enunciated by the Court of Appeals for the Sixth Circuit and applied in this case:

> An arbitration award conclusively determines the rights of the parties unless it is invalidated by a reviewing court. ... Thus, if the award is upheld in a reviewing court, the rights of the parties are determined from the date of the award and not the date of the court's judgment confirming the award. ... Any other result would defeat the purpose of arbitration which is to finally decide issues between the arbitrating parties without judicial intervention. It should be the rule, rather than the exception, that when arbitrators hand down an award the parties will comply with it, without the necessity of court proceedings ....
>
> ... In other words, a court's judgment confirming an arbitration award must reflect what would have happened had the parties immediately complied with the award instead of going to court.

Marion Manufacturing Co. v. *Long*, 588 F.2d 538, 541-42 (6th Cir. 1978). Under this principle, the interim award required Gainesville to accept coal delivered from and after May 23 under the May 11, 1983 contractual status quo. As of May 11, coal was being delivered at the rate of 10,000 tons every eight days. Gainesville, however, refused to accept nine shipments of coal tendered during the interval between entry of the interim award and its judicial confirmation. The district court's order only required Gainesville to do that which the interim award required it to do —accept this coal as it would have done under the coal sales contract.

But, significantly, nothing in any order or judgment of the district court ever required Gainesville to adhere to any particular schedule in picking up this "missed" coal. In-

deed, the district court so stated (*See* Appendix at 15a-16a, 22a). Far from prescribing a schedule, the district court directed the parties to establish their own "mutually agreeable timetable" (Appendix at 17a). The judgment appealed from required only that Gainesville "accept the disputed shipments of coal under a commercially reasonable agreement," on pain of contempt (Appendix at 23a). In affirming, it was thus unnecessary for the court of appeals to conclude that the district court had modified the arbitral award, nor did it reach any such conclusion.* It simply affirmed one district court's action to enforce its own judgment in the face of a recalcitrant party's refusal to obey.

This case is not remotely like those cited in the petition as instances in which the district court "substitute[d] its judgment for that of the arbitrators" by "substantially altering" the scope of their award. *Diapulse Corp.* v. *Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980). Rather, this is an instance in which a party "attempt[s] to create an ambiguity [in the award] where none exists." *Cleveland Paper Handlers* v. *E.W. Scripps Co.*, 681 F.2d 457, 460 (6th Cir. 1982).** Under the circumstances, there is no general question of law to be decided by this Court.

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* Gainesville's argument that the district court enjoys no power to modify or correct an award *sua sponte* (Point IB) is thus irrelevant to the facts of the instant case. Gainesville's contentions as to the 90-day statute of limitations under 9 U.S.C. § 12 are also irrelevant in that the district court proceeding here involved was a contempt proceeding, not a proceeding under Section 11 (or any section) of the Federal Arbitration Act, and therefore not subject to the statute of limitations contained in Section 12 of that act.

** *Cleveland Paper Handlers* would be distinguishable in any event, for it, like most of the cases cited in Point III of the petition, arose under the Labor Management Relations Act, 29 U.S.C. § 185, and not the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* It may also be noted that Gainesville's first quotation from *Cleveland Paper Handlers* (Pet. at 10) comes from the publisher's headnote and not the opinion itself.

II. THERE IS NO CONFLICT WITH DECISIONS OF THIS COURT OR THOSE OF ANY COURT OF APPEALS

Gainesville urges that the decision of the Sixth Circuit Court of Appeals conflicts with decisions from other courts of appeal by expanding the scope of review on a petition for modification under Section 11 of the Federal Arbitration Act (Point I) and by expanding the district court's fact-finding powers (Point III), and also contends that it conflicts with decisions of this Court by permitting untimely amendment of a judgment (Point IV). As noted above, no Section 11 proceeding was involved; in fact, the district court proceedings were in enforcement of a judgment, and thus no longer properly were proceedings under the Arbitration Act. Moreover, the district court neither made "additional" findings of fact nor amended its judgment. Finally, the overwhelming proportion of Gainesville's authority is Sixth Circuit case law, and obviously presents no inter-circuit conflict for resolution.* In short, the decisions on which Gainesville relies are distinguishable, both factually** and legally, and simply do not raise "special and important reasons" for certiorari review. Sup. Ct. R. 17.1.

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* Three of the four court of appeals decisions cited in Point I, three of the six court of appeals decisions cited in Point III, and both of the two court of appeals decisions cited in Point IV are Sixth Circuit cases. Furthermore, the Sixth Circuit cases cited by Gainesville are not in conflict with the decision below. If anything, they suggest the extent to which the decision below follows an unbroken line of authority, a further reason militating against certiorari review. Similarly, while Point IV asserts that a conflict exists with decisions of this Court in that the result below permitted untimely amendment of a judgment, that portion of the petition cites only one decision of this Court, a decision which did not involve an amended judgment.

** In *Bell Aerospace Co.* v. *Local 516, UAW,* 500 F.2d 921 (2d Cir. 1974), for example, the court characterized the arbitration award as "contradictory on its face." *Id.* at 924. No such flaw exists here.

All of the cases relied upon in Point III of the petition are labor law cases, not Arbitration Act cases. Labor cases are not decided under the Federal Arbitration Act, which specifically excludes from its scope "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, and present considerations which do not apply in commercial contexts. Moreover, the citation of *Oil, Chemical & Atomic Workers International Union* v. *Rohm & Haas, Inc.*, 677 F.2d 492 (5th Cir. 1982); *Boston Shipping Ass'n, Inc.* v. *International Longshoremen's Ass'n*, 659 F.2d 1 (1st Cir. 1981); and *United Papermakers & Paperworkers* v. *Westvaco Corp.*, 461 F.Supp. 1022 (W.D.Va. 1978), suggests that Gainesville has confused judicial reluctance to give precedential effect to an earlier arbitration award in a subsequent collateral labor dispute with the court's power to enforce compliance with its own judgments, including its judgments confirming arbitration awards.

Gainesville acknowledges that confirmation of an arbitration award binds the parties as to "any matters explicitly included in the arbitrators' order, or any matters *necessarily* implied by the arbitrators' order" (Pet. at 18) (emphasis by Gainesville). The contractual status quo existing on May 11, 1983 was such a matter. Since Gainesville did not disclose to the arbitrators that it intended to disobey their interim award for as long as it could do so without suffering judicial sanctions, there was no reason for the panel to include anything in its order with respect to "missed shipments." But this omission in no way diminishes Gainesville's knowledge and acknowledgment of the status quo, incorporated by the arbitrators into their interim award, which the district court confirmed.

Having confirmed the interim award, the district court had available to it the full panoply of its powers to effect enforcement. "It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees, and judgments, which remain unreversed, when the subject-matter and the parties are the same in both proceedings." *Root* v. *Woolworth*, 150 U.S. 401, 410-11 (1893). *Accord: In re Lafayette Radio Electronics Corp.*, 761 F.2d 84, 93 (2d Cir. 1985) ("Since ancillary jurisdiction is recognized as a part of a court's inherent power to prevent its judgments and orders from being ignored or avoided with impunity, it would make little sense to rule that a court's injunction could be enforced only by entry of another injunctive order and to deny the court the power to punish the contemnor or to award redress for the violation of its injunction."); *Sarabia* v. *Toledo Police Patrolman's Ass'n*, 601 F.2d 914, 919 (6th Cir. 1979) (rejecting claim that court had modified consent decree and recognizing court's power to effectuate its earlier judgment). It follows, as the court concluded in *San Francisco Electrical Contractors Ass'n* v. *International Brotherhood of Electrical Workers, Local No. 6*, 577 F.2d 529 (9th Cir.), *cert. denied*, 439 U.S. 966 (1978), that "[i]f . . . the court is to have authority to enforce the award, it must have the authority to construe it. To hold otherwise would in effect deny the court power to enforce, since every effort made in that direction would successively and interminably require further arbitration." *Id.* at 534.

None of the cases cited in Point IV, purportedly dealing with untimely amendment of a final judgment, bear on the instant petition, for none involved a situation where, as here, the district court was faced with a party's refusal to

obey an existing order.* Here, "the issue of whether there were any violations concerns only a particular order as applied to a discrete set of facts and therefore would not warrant this Court's grant of a petition for certiorari." *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 226 n.2 (1975). As Justice Frankfurter observed:

> Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarassing conflict of opinion and authority between the Circuit Courts of Appeals."

NLRB v. *Pittsburg S.S. Co.*, 340 U.S. 498, 502 (1951), *quoting Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). This is not such a case.

Conclusion

This Court has recently reaffirmed that the Federal Arbitration Act is "a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital*, 460 U.S. at 24. Grant of certiorari in this case, where Gainesville treated the arbitration award as a nullity until it was confirmed and still maintains that the district court lacked the power to enforce its own judgment confirming that award, could only be construed as an invitation to the losing parties in arbitration proceedings to disregard arbitral awards.

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* In *Gray* v. *Dukedom Bank*, 216 F.2d 108 (6th Cir. 1954), interest was imposed on a judgment which had already been paid. In *Jetero Construction Co.* v. *South Memphis Lumber Co.*, 531 F.2d 1348 (6th Cir. 1976), a judgment was increased by $10,000 pursuant to a second, untimely motion to amend. In *Hodgson* v. *American Can Co.*, 317 F.Supp. 152 (W.D.Ark. 1970), *aff'd in part and rev'd in part*, 440 F.2d 916 (8th Cir. 1971), the district court deleted a provision for prejudgment interest on a motion under Rule 60 and was reversed in that respect on appeal. In *Milwee* v. *Peachtree Cypress Investment Co.*, 510 F.Supp. 284 (E.D.Tenn. 1979), *aff'd mem.*, 644 F.2d 885 (6th Cir. 1981), an unsuccessful alternative motion to alter or amend or to obtain a new trial was involved.

Gainesville's petition presents no issue not confined to the particular facts of this case and more especially to Gainesville's persistent refusal fully to obey the award rendered in an arbitration Gainesville itself commenced. No modification of that award was made by the district court, nor did the opinion of the Court of Appeals for the Sixth Circuit rest upon the conclusion that one had been made. Moreover, no conflict with decisions of this Court or with those of other courts of appeal has been shown. Finally, the Court of Appeals for the Sixth Circuit considered and properly decided the only issue which was before it—whether the district court had the power to enforce its own judgment of confirmation. Accordingly, the petition for a writ of certiorari should be denied.

Dated: October 9, 1985

Respectfully submitted,

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APPENDIX

Nos. 83-5521, 83-5547

United States Court of Appeals
Sixth Circuit.

Argued Jan. 20, 1984.

Decided March 15, 1984.

ISLAND CREEK COAL SALES COMPANY,

Plaintiff-Appellee,

v.

CITY OF GAINESVILLE, FLORIDA,

Defendant-Appellant.

Bert T. Combs, M. Stephen Pitt, Merrill S. Schell (argued), Sharon Conyer Spiegel, Wyatt, Tarrant & Combs, Louisville, Ky., for defendant-appellant.

Charles Calk, R. Allen Webb, Gess, Mattingly Saunier & Atchison, Lexington, Ky., Martin F. Brecker, Janet Kane (argued), New York City, for plaintiff-appellee in both cases.

Phillips, Nizer, Benjamin, Krim & Ballon, New York City, for plaintiff-appellee in No. 83-5521.

Before EDWARDS, MERRITT and JONES, Circuit Judges.

MERRITT, Circuit Judge.

On this appeal the main question is whether the District Court properly confirmed an interim arbitration award requiring the electrical utility which initiated the arbitration proceeding to continue performance of a coal purchase contract until the arbitration panel rendered a final arbitration order. We affirm.

I.

On July 26, 1978, Island Creek Coal Sales Company and the City of Gainesville, Florida entered into a long-term Coal Sales Agreement which provided that Island Creek would sell and Gainesville would buy coal supplied primarily from a mine known as "Holden 22." The price of coal declined, and in January of 1983, Gainesville sought to terminate its contract with Island Creek. It initiated an arbitration proceeding in Louisville, Kentucky, under the auspices of the American Arbitration Association ("AAA"), alleging that Island Creek had breached its agreement by reason of an illegal assignment of the contract and transfer of Holden 22. At the arbitration proceedings Gainesville requested as relief a "[d]eclaration that Island Creek . . . ha[d] breached the Agreement and that the City of Gainesville, Florida, has the right to terminate it." Petition for Confirmation of Arbitration Award of May 23, 1983, Exhibit 2.

As its defense at the arbitration hearing, Island Creek argued that it continued to control the coal reserves at Holden 22 as required by the Agreement, that no assignment had occurred, that the transaction which prompted

Gainesville's allegations of breach of contract was expressly permissible under the Agreement, and that Gainesville's consent to the transaction was unnecessary. On May 10-11, 1983, a full evidentiary hearing was conducted in Kentucky before a three-member arbitration panel, which set a schedule at the conclusion of the hearings for the submission of post-hearing briefs.

On May 16, 1983, after the arbitration hearings concluded but before the award was issued, Gainesville announced that it intended to terminate the Agreement. On May 19, 1983, Island Creek submitted a written request to compel Gainesville to preserve the status quo until the arbitrators could decide whether in fact the City had the right to terminate.

On May 23, 1983, a telephone conference call was conducted in which counsel for Gainesville and Island Creek and the three arbitrators participated. At the conclusion of the conference call, the three arbitrators ruled that Gainesville, having previously submitted to arbitration the question of its right to terminate, would now be restrained from cancelling the agreement pending completion of the arbitration. Accordingly, the panel issued an interim order directing Gainesville to "continue performance of the contract . . . by accepting shipments of coal from the Holden 22 mine until further order of this panel." Interim Order, May 23, 1983, Exhibit 4, at 1.

Refusing to accept and pay for coal as directed by the interim order, Gainesville, on May 31, 1983, commenced an action in the United States District Court for the Northern District of Florida to vacate the interim order. In that action, Gainesville claimed that, *inter alia,* Island Creek had committed fraud and violations of federal and Florida anti-racketeering statutes.

Also on May 31, 1983, Island Creek commenced an action in the United States District Court for the Western District of Kentucky, the District in which the arbitration was pending. In this action, Island Creek requested judicial confirmation of the interim arbitration order and an order preliminarily enjoining Gainesville from proceeding with that part of its Florida action in which Gainesville sought to vacate the interim order. On July 22, 1983, Chief Judge Allen granted the preliminary injunction and entered judgment confirming the interim order.

II.

The scope of judicial review of an arbitration award is limited. Under 9 U.S.C. § 9 (1982), "the court must grant . . . an order [confirming an arbitration award] unless the award is vacated, modified, or corrected as prescribed in [9 U.S.C. §§ 10 and 11 (1982)]." Section 10 permits the court to vacate an award only in certain limited situations, such as "[w]here the arbitrators exceeded their powers," or failed to make "a mutual, final, and definite award upon the subject matter submitted."

Gainesville argues that the District Court should have vacated the interim arbitration order because the order was issued in violation of section 10(b) of the Arbitration Act. The argument is based on a claim that the arbitrators exceeded their authority in rendering the award because the arbitrators did not have the power to grant interim equitable relief. Gainesville argues as well that the District Court lacked jurisdiction because the interim order was not a final award for the purpose of confirmation. Gainesville also contends the interim order was issued in violation of section 10(c) of the Act because Gainesville was denied due process in the emergency telephone hearing.

III.

Whether the arbitrators exceeded their authority by awarding interim injunctive relief depends on an examination of the Agreement to determine what remedial powers the Agreement confers on the arbitrators. Article XIII of the Agreement provides that any dispute between the parties should be settled by arbitration, and provides further that the AAA Commercial Arbitration Rules are incorporated in the Agreement. In addition, Article XVIII provides that arbitrators must grant certain "specific" remedies in certain situations, *e.g., for violation of sulphur content* specification, but that "for any other breach of the Agreement" damages will be determined by the arbitrators according to express rules defining the measure of damages. The Agreement only addresses those possible breaches of contract in which money damages are appropriate; it is silent in regard to the possibility of equitable relief.

The authority for equitable relief arises from Rule 43 of the AAA Commercial Arbitration Rules which the Agreement incorporates by reference. Rule 43 provides that "[t]he arbitrator may grant any remedy or relief which the arbitrator deems just and equitable and within the scope of the agreement of the parties, including but not limited to, specific performance of a contract." Under this Rule an arbitrator can order specific performance to preserve the status quo under the contract unless the contract expressly prevents such relief. The Agreement here does not provide any specific limitations on the power of the arbitrators under Rule 43, and we are required to give deference to the arbitrators' interpretation of the Rule and the Agreement unless they have clearly exceeded their authority. We conclude that the interim award in the instant case

requiring specific performance is not outside the scope of the Agreement and, thus, does not exceed the arbitrators' powers. *See Marion Manufacturing Co.* v. *Long,* 588 F.2d 538 (6th Cir. 1978) (upholding arbitration order of specific performance). We find nothing in the contract between the parties or in Kentucky law that prevents the arbitrators from ordering the interim injunctive relief awarded in this case. *See Sperry International Trade, Inc.* v. *Israel,* 689 F.2d 301 (2d Cir. 1982). In *Sperry,* the Court held that arbitrators acting under the AAA Rules may grant interim injunctive relief by exercising the "power to prevent" drawing down the proceeds of a letter of credit, "pending a decision [by the arbitrators] on the merits" of the claims. 689 F.2d at 306.

Gainesville's final argument under section 10(d) is that the interim order is nonfinal and thus not subject to confirmation. This argument overlooks the rule that "an 'interim' award that finally and definitively disposes of a separate independent claim may be confirmed 'notwithstanding the absence of an award that finally disposes of all the claims that were submitted to arbitration.'" *Eurolines Shipping Co.* v. *Metal Transport Corp.,* 491 F.Supp. 590, 592 (S.D.N.Y. 1980), *quoting Puerto Rico Maritime Shipping Authority* v. *Star Lines, Ltd.,* 454 F.Supp. 368, 372 (S.D.N.Y. 1978). *See also Sperry International Trade, Inc.,* 689 F.2d 301 (2d Cir. 1982); *Sportswear Garment Workers' Union, Local 246* v. *Evans Manufacturing Co.,* 319 F.2d 528 (3d Cir. 1963). Chief Judge Allen concluded that "[t]he interim award disposes of one self-contained issue, namely, whether the City is required to perform the contract during the pendency of the arbitration proceedings. Th[is] issue is a separate, discrete, independent, sev-

erable issue." Memorandum Opinion, July 24, 1983, at 8. We do not find this conclusion to be in error. Accordingly, we find that the interim order was not issued in violation of section 10(d).

IV.

We also reject Gainesville's numerous additional arguments that the interim order was issued in violation of section 10(c) because the arbitrators denied Gainesville a fair hearing and due process throughout the arbitration proceedings and that the District Court below did not have exclusive jurisdiction to confirm the arbitrators' interim order. Arbitrators need not provide all the procedural formalities of a court of law, *American Almond Products Co.* v. *Consolidated Pecan Sales Co.*, 144 F.2d 448, 451 (2d Cir. 1944), and defects in proceedings prior to or during arbitration may be waived if a party participates in the arbitration proceedings without objection. *Order of Railway Conductors* v. *Clinchfield*, 407 F.2d 985, 988 (6th Cir.), *cert. denied*, 396 U.S. 841, 90 S.Ct. 104, 24 L.Ed.2d 92 (1969).

We have reviewed the record, and we do not find that Chief Judge Allen erred in his conclusion that the arbitration proceedings were fair and in accordance with due process and that Gainesville participated in those proceedings without objection. Gainesville's arguments in this respect are without merit.

Contrary to Gainesville's final assertion, the District Court below had exclusive jurisdiction to review the arbitrators' interim order. The arbitration and award in question occurred in Kentucky, and 9 U.S.C. § 9 provides that "[i]f no court is specified in the agreement of the parties [for confirming the arbitration award], then such applica-

tion [for a confirmation order] may be made to the United States court in and for the district within which such award was made." This statutory provision and the relevant case law clearly indicate the United States District Court for the Western District of Kentucky was the proper court to confirm the arbitration award. *See, e.g., Commonwealth Edison Co.* v. *Gulf Oil Co.*, 541 F.2d 1263, 1272 n.16 (7th Cir. 1976); *City of Naples* v. *Prepakt Concrete Co.*, 490 F.2d 182 (5th Cir.), *cert. denied*, 419 U.S. 843, 95 S.Ct. 76, 42 L.Ed.2d 71 (1974); *United States ex rel. Chicago Bridge & Iron Co.* v. *ETS-Hokin Corp.*, 397 F.2d 935, 938 (9th Cir. 1968).

Accordingly, we affirm the judgment of the District Court.